(4)

No. 91 - 443

In The

Supreme Court of the United States

October Term, 1991

DANIEL R. HODGE, M.D.,

Petitioner,

vs.

LAKE SHORE HOSPITAL, INC., STAT SERVICES, INC., JOSEPH G. CARDAMONE, M.D., LYNN FELDMAN, D.O., JAMES B. FOSTER, C.E.O.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO CARDAMONE'S BRIEF IN OPPOSITION

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October 24, 1991

QUESTIONS PRESENTED

1. Whether respondent Cardamone's proposed **"theory of innocence"** suffers from severe substantive, tangible, temporal, timing and spatial incongruences, in addition to being totally contrary and wholly inconsistent with his blanket admission?

2. Whether this Court must declare that **unlawful racial discriminatory intent** under 42 U.S.C 1981, 1985 (3) and 1986 can be proved by **documentary evidence** and that this reprehensible conduct by the respondents must be denounced and severely penalized?

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REPLY

Respondent Cardamone in his **Brief in Opposition** attempts to characterize his role in this grotesque and gruesome butchery of Petitioner's medical career, as being this distant, aloof, private physician from neighboring Dunkirk, New York, who merely has staff privileges at Lake Shore Hospital, in Irving, New York, and who voluntarily - as a community service - served as Chair of Lake Shore Hospital's Emergency Room Committee during the calendar year of 1986, and had no role in staffing decisions - since that's not the function of the Emergency Room Committee, says he - or scheduling of work in Lake Shore's Emergency Room, but functioned so nobly as a **"quality assurance"** sleuth, sniffing around in that capacity to **"review complaints about staff services and procedures."**

Indeed it was in this honored mien that Chair of Lake Shore's Emergency Room Committee, Cardamone, surreptitiously, according to Respondent Feldman (A 23, A referring to the page in the **Appendix for the Appellant** below) overheard Petitioner's conversation with the mother of the hysterical **asthmatic**[1]

Respondent Cardamone proclaims to the world that in his honored capacity as a **"quality assurance"** czar, he **"requested that the Emergency Room Committee evaluate Petitioner's treatment**

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[1] Patient A, is the asthmatic in the so-called **statement of charges** of the department of health, office of professional medical conduct, brought against Petitioner on April 12, 1988, barely two months after ***Hodge vs. Lake Shore Hospital et al.,*** was dismissed be the district court on February 4, 1988. Patient A, who in no way would have been aware of the suit, was, as were others, induced in a conspiracy with Respondents Feldman, Cardamone and Foster, among others, to sign an affidavit alleging that she didn't give Petitioner permission to, **"reveal personally identifiable information obtained in a professional capacity without prior consent of the patient,"** purportedly within the meaning of 8 NYCRR 29.1 (a)(8), a rule of the education department.

The mere triviality of the charge, demonstrates the extent to which the Respondents would stoop to harm this Petitioner, for accidentally not **"whiting out"** Patient A's name in Petitioner's district court affidavit, even then, a totally harmless error, readily correctable pursuant to F.R.C.P. Rule 60 (a), which provides for the correction of clerical mistakes in judgments and **"other parts of the record . . . arising from oversight or omission."** No other persons, but the parties in the action, had been privy to that Patient A oversight, at the time the charge was made.

of a patient with a nearly severed toe, because he deemed it to be very inadequate." (That famous "from-himself-to-himself" request and conflict-of-interest-laden peer review process) That "deemed-very-inadequate" concern, even had it been so perceived by him at the time of the patient's admission September 25, 1986, was indeed an extremely isolated medical point of view, held by none others in the medical literature, and therefore most surely was a royal hoax according to the well-established medical principles of amputation and replantation surgery.

Respondent Cardamone's convoluted and contrary assertions, and the documentary evidence controverting those malicious and perjurious proclamations, presents Respondent Cardamone in his truest light as being a pernicious liar who cannot escape criminal, let alone civil liability for his conspiratorial misdeeds.

A-R-G-U-M-E-N-T

POINT I

Respondent Cardamone's Proposed "Theory Of Innocence" Suffers From Severe Substantive, Tangible, Temporal, Timing And Spatial Incongruences, In Addition To Being Totally Contrary And Wholly Inconsistent With His Blanket Admissions.

Respondent Cardamone's proposed "theory of innocence" suffers from severe substantive, tangible, temporal, timing and spatial incongruences, in addition to being totally contrary and wholly inconsistent with his blanket admissions, pursuant to his August 10, 1987, FRCP Rule 12 (b)(6) motion to dismiss. Those admissions were operatively described with particularity - in Petitioner's affidavit - sworn to on June 2, 1987, simultaneously dated and filed with the complaint.

According to the June 2, 1987 blanket admission version of the Cardamone "theory of innocence" the following paragon of profligacy is uncovered in paragraphs 66 and 67 (A 34):

66. Then, in a totally contrived scheme devised only after the plaintiff confronted defendant Dr. Feldman, about being dropped from the Emergency Room Physician's roster, in January 1987, the Emergency Room Committee sent the plaintiff

communications on February 27, 1987 and March 6, 1987 regarding the incident of alleged malpractice which presumably was the straw that broke the camel's back and was the "bona fide" reason the defendants dropped the plaintiff from the Emergency Room physician's roster in January 1987.

67. All this was "inadvertently not sent to the plaintiff" following the late November, 1986, Emergency Department meeting. But, the plaintiff was not "inadvertently dropped" from the Emergency Room physician's roster in January, 1987, because that illegal, racist and unwarranted act did not have Board approval although the Board cannot escape a negligence charge. The defendant, Mr. Foster, defendant Dr. Feldman and defendant Dr. Cardamone, had hoped that the plaintiff would get in the wind after the plaintiff was leaked the adverse review of the alleged malpractice regarding the toe through the grape vine."

Aside from the problem of illegal **"leaks,"** which was recently responsible for the disgraceful national theatrical farce, sponsored by the judiciary committee of the United States Senate, an admission is an admission, whether proffered or requested. Respondent Cardamone is being represented by reputedly very competent counsel. Respondent Cardamone, of course, had the option to deny a piece and admit a portion of Petitioner's complaint and particularizing adjunctive affidavit. Respondent Cardamone opted to admit them in their entirety, operative facts and all.

The reference and use of the term **"racist"** in the complaint and affidavit, is something most white people who, in fact are racist, seem to find so horribly offensive. Some murderers in Attica Prison are at times quite offended by references to them as murderers. In the instant case, the term racist referred to the fact that Petitioner very well knew from documented evidence that Dr. Gilbert, D.O., a white individual - and quite a congenial fellow - had been subjected by the Respondents to **"corrective action"** and could still work in Lake Shore Hospital's Emergency Room, because by definition **white-is-right**, no matter how inappropriate, indecorous or even atrocious the conduct in question. That's just a plain ole' fact-a-life and phenomenon-a-nature in the white world. If revealing those unfortunate facts makes most white people uncomfortable, well then that's just too bad. Every Black individual is humiliated daily by the chicanery

of white racism and learns to live with those harsh realities in America. It has to stop!

The **timing** of the proffered justification for the removal of Petitioner from the Emergency Room physician's roster and the **source** was the most damaging evidence to completely pin Respondent Cardamone into the collusive carousel of criminality, because the **"December 2, 1986 letter [in which] he solicited Dr. Hodge's comments,"** was actually a **fraudulent document** prepared after-the-fact when Petitioner insisted that the reason for the removal be **"put in writing."** And indeed it was, and, of course, it was then **"'inadvertently not sent to the Petitioner following the late November, 1986, Emergency Department meeting."**

Moreover, what - but guilt - could induce and cause Respondent Joseph G. Cardamone, M.D., to repeatedly make **totally false and perjurious statements** in his Affidavit (A 58-62), sworn to on August 10, 1987?

Respondent Cardamone alleged in paragraph 8, that, **"The Emergency Room Committee monitors and reviews the quality of services rendered in the Emergency Room, but *does not involve itself in personnel decisions*. . . . The Committee's function *is not to discipline individual physicians or nurses*, ..."** And in paragraph 9, that,

"The Emergency Room Committee *has no involvement* in these staffing decisions." And in paragraph 14, that, **"After I left, I did not expect the Emergency Room Committee to address any issues relating to Dr. Hodge's schedule at Lake Shore or any other hospital, as *this was not its function*, . "**

But the fact is that the **Emergency Room Committee** presently makes, will continue in the future to make, and has been making decisions about its **physician's roster** for years and in the example of - a terminated physician - Dr. Paul, even going way back to March 27, 1981, during which **Emergency Room Committee** meeting it was established and noted that,

"In review of E.R. Charts - letter from this Committee to Medical Records requesting Dr. Buran to *eliminate Dr. Paul from E.R. roster*. Agreement of all members. Letter to Medical Records requesting Dr. Buran to *eliminate Dr. Paul from resident staffings*. Letters to be submitted to Medical Administration Committee first."

The incident concerning the virtually amputated toe was the alleged **"malpractice"** which presumably was the straw that broke the camel's back and was the **"bona fide"** reason the Respondents dropped the Petitioner from the Emergency Room physician's roster on January 13, 1987.

In his September 24, 1986 Lake Shore Emergency Department Committee meeting, Chairman Respondent, Joseph G. Cardamone, M.D., notes - which goes to show that these even mediocre documentations are not at all benign - as **"unfinished business,"** that,

"Complaint referred to [Respondent, Lynn Feldman, D.O.], regarding [Petitioner Daniel Hodge] as well as additional complaint has been handled by counseling the physician. No further review required at this time. Performance of [Petitioner, Daniel Hodge] will continue to be monitored in the ER."

There were also, at that meeting, a couple of **"generic screens,"** which are euphemisms for nurses' **"whistle blowing reports"** about the **"bad things"** that physician, Daniel Hodge, was perceived, by a bunch of ill-educated nurses **[one of whom testified as a fact witness against Petitioner for the New York State department of health, office of professional medical conduct]** to have done wrong. It was noted in the September 24, 1986 Lake Shore Emergency Department Committee meeting report:

Problem:	**Daniel Hodge's attitude with patient in ER.**
Action:	**None required physician has been counseled.**
Problem:	**ER staff questioned patient care - delay in treatment by Daniel Hodge.**
Action:	**Delay in treatment considered inappropriate. Daniel Hodge's performance in the ER will be monitored. No further action required at this time.**

At the next Emergency Department Committee on November 21, 1986, Chairman Respondent, Joseph G. Cardamone, M.D., placed the 15 year-old **"incomplete"** amputation case on the agenda and mentions that famous, self-servingly malicious **"from-himself-to-himself,"** complaint letter:

"Letter from physician [Chairman Respondent, Joseph G. Cardamone, M.D.], regarding a 15 year old patient presenting in

ER, treatment by physician, [Daniel Hodge], and admitted by physician [Dr. Smith]. Physician [Chairman Respondent, Joseph G. Cardamone, M.D.], consulted and patient taken to surgery and repair of injury.

Discussion - Initial exam by physician reviewed. Extent of injury should have been recognized."

There was absolutely nothing of any great moment which transpired in that November 21, 1986 Emergency Department Committee meeting to explain, let alone warrant the precipitous action of dropping this Black Petitioner from the Emergency Room physician's roster, without the most basic of bylaw procedural protections, being granted to white physician, Dr. Gilbert and that was granted to white physician Dr. Paul, both of whom were considered by the Emergency Committee to be highly incompetent.

No where in any part of any record in the hospital or in this proceeding is there to be found **"an ad hoc committee report of a corrective action interview,"** with Petitioner, nor nowhere in any record anywhere is there evidence that the medical executive committee of Lake Shore Hospital appointed an ad hoc committee to conduct a preliminary interview with Petitioner, Daniel Hodge, which are the most fundamental of requirements of the Lake Shore Hospital bylaws which so routinely were applied to even white incompetent physicians. Lake Shore Hospital on the contrary considered Petitioner to be in that class of professionally competent physicians continuously meeting the hospital's qualifications, standards and requirements, and having the privilege of membership on the medical staff and emergency staff (A 189-200) to which Petitioner is entitled.

The president of the Lake Shore Hospital Board of Directors, Russell Newman, had written to the Petitioner on January 12, 1987, (A 135) announcing that on December 23, 1986, (A 134) Delmar Brinkman Chairman of the Board, had renewed the Petitioner, Daniel Hodge's Emergency department privileges. The letter stated in part,

"Your participation during 1985 and 1986 in the activities of the Medical Staff has contributed greatly to the success of Lake Shore Hospital. On behalf of the Board of Directors, I wish

to thank you and to inform you that the Board has approved your reappointment to the Medical Staff for 1987 and 1988 on the Emergency Services Staff.

Privileges are granted as specified in the delineation form which is attached for your information."

Respondent Cardamone seeks refuge in the ***Patterson vs. McLean Credit Union,*** 491 U.S. 164 (1989), decision of this Court which held that 42 U.S.C. 1981 protects only the **right to** <u>make</u> **contracts** and the **right to** <u>enforce</u> **contracts** and does not extend to **post-contract formation** conduct. Respondent Cardamone's reliance on ***Patterson,*** for exoneration from his woefully culpable, conspiratorial and despicably racist conduct, is, to say the least, ludicrous. Respondent Stat Services P.C., is the corporate physician Emergency Room staffing & scheduling, veil & vehicle, through which Respondent Feldman executes the wishes and directives of the Lake Shore Hospital Board. Neither Respondent Stat Services P.C., nor Respondent Feldman have any authority whatsoever to carry out any function contrary to the wishes of the Lake Shore Hospital Board, and most definitely not some **ridiculous ultra vires, chicanery** like dropping a physician from the Emergency Room physician's roster contrary to the expressed wishes and directives of the Lake Shore Hospital Board.

The limiting and determinate factor in the relational equation between the parties, <u>is the granting of privileges</u> by the Lake Shore Hospital Board, which as a practical matter, automatically resets the clock every two years and formally renews all instruments of implementation of the Lake Shore Hospital Board's directives including, of course, the formation of a new contractual agreement (See **Agreement** in the Appendix pages RP 1-3) - as has been the case since September 7, 1984 - between Petitioner and Stat Services P.C., which simply <u>has not been enforced</u> by the courts below. It is as simple as that!

The **operative facts** of Petitioner's contractual Agreement with Stat Services P.C., were that (1) the professional corporation hired Petitioner physician to provide professional services for the emergency department of the Lake Shore and Tri-County Memorial Hospitals **"according to a schedule to be**

established by mutual consent of the parties hereto;" that (2) Petitioner's relation to the professional corporation was, during the period or periods involved, one of **an independent contractor**; that (3) Petitioner was also even more importantly an **independent professional** over which Stat Services, P.C., **"shall neither have nor exercise any control or direction over the methods by which Physician performs his duties under this Agreement,"** and finally that (4), **"either party hereto may terminate this Agreement upon two weeks' written notice to the other party."**

Petitioner had established a schedule by mutual consent, was an independent contractor and independent professional who refused to allow the Respondents to neither have nor exercise any control or direction over the scientific methods by which Petitioner performed Petitioner's duties, regardless of the so-called **"public relations"** policies of the Lake Shore Hospital and Petitioner was terminated for reason that were blatantly malicious and racist, without any notice whatsoever and most surely contrary to the expressed wishes and directives of the Lake Shore Hospital Board. And yet an incompetent white doctor is allowed to work. It is a national disgrace!

These blatantly discriminatory acts were **intentional**, ***Domingo vs. New England Fish Co.,*** C.A. Wash. 1984, 727 F. 2d 1429 (1987), and **intent** may be proved by **circumstantial evidence,** such as a **pattern of conduct** unexplainable on grounds other than race. Petitioner emphatically asserts that the **unlawful discriminatory intent** of these Respondents most certainly can be proved from the **documentary evidence,** in this long paper trail of collusive culpability.

POINT II

This Court Must Declare That Unlawful Racial Discriminatory Intent Under 42 U.S.C 1981, 1985 (3) And 1986 Can Be Proved By Documentary Evidence And That This Reprehensible Conduct By The Respondents Must Be Denounced And Severely Penalized.

There is no doubt in the minds of reasonable people that the conduct perpetrated by the Respondent Cardamone and his

conspirators is wholly unacceptable in our system of health care and in the nation's work places and with regards to its work force. A hospital privilege is a most valuable intellectual property interest as is a good professional medical reputation, without which a physician's license is virtually useless.

Scientific analysis of the Petitioner's professional conduct - to the extent that this Court can reasonably appreciate and understand - has shown that Petitioner's professional acumen and skills are exemplary, and comport with **best evidence medical standards** found in textbooks, manuals, periodicals and journals. The so-called order of the New York State commissioner of education, calendar 10444, now also before this Court in ***Hodge vs. New York State Education Department et al.,*** 91-470, has similarly been demonstrated - to the extent that this Court may be able to appreciate and understand - to be wholly a scientific fraud having a purpose and motive insupportable under any medical or legal rationale.

The Respondents were deeply involved in the conspiracy with the New York State department of health, having provided 14 of the 20 so-called cases of professional medical misconduct in the totally bogus, **statement of charges.** Each and every one of those charges are false, fabricated and malicious, having nothing whatsoever to do with the bona fide practice of medicine or function of the peer review process as such review is performed by physicians of reputable professional character and good will.

Respondent Cardamone considers that, **"Petitioner's reliance on so-called 'documentary' evidence is misplaced. That Lake Shore Hospital sent petitioner a letter initially renewing his privileges was not binding, and the Hospital *could subsequently decide to withdraw those privileges* based upon a review of petitioner's treatment of patients."** Respondent Cardamone should - before proceeding in his harlequinade - first review the **established admissions** of his co-conspirator Respondent Foster, who (A 166-168) in his **Affidavit in Opposition** to the Petitioner's **Cross-Motion for Summary Judgment,** sworn to on September 10th, 1987, in paragraph 5, admitted that, **"No 'corrective action' has been requested, privileges restricted or membership on the medical staff affected by the hospital regarding Dr. Hodge."**

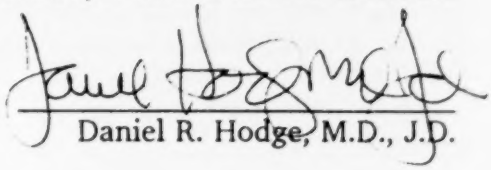
Respondent Cardamone proposes hypothetical suppositions, assumptions and probabilities of diversionary scenarios and circumstances having nothing to do with the horrific facts of this case. Respondent Cardamone's defensive arguments are similarly desultory, climbing from pilar to post seeking refuge in canned brief, circumlocutory fjords and exculpatory clauses, academic dissertations and nauseating legalese. This national disgrace couldn't be more sordidly simple: Two white doctors, having hospital privileges restricted or terminated, at the very least had the benefits of bylaw provisions however onerous their outcomes, but a Black physician, an exemplary, independent professional, object of jealousy and race hate, is dropped from the Emergency Room physician's roster, with not even as much as **notice,** let alone **an opportunity to be heard,** as the hospital bylaws mandate.

The Lake Shore Hospital Board, was informed that Respondents Cardamone, Feldman and Foster had in a blatant conspiracy violated the hospital's bylaws, and did absolutely nothing about correcting the matter and are therefore just as guilty as the perpetrators. 42 U.S.C. 1985(3), 1986. The courts below refused to perform a duty enjoined upon them by law: Enforce the directives of the Lake Shore Hospital Board pursuant to 42 U.S.C. 1981, 1985(3) and 1986. This Court must forcefully declare the rights of this Petitioner and make this severely damaged Petitioner whole again.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should be issued.

Dated: Buffalo, N.Y.
October 24, 1991



Daniel R. Hodge, M.D., J.D.

AGREEMENT

This **AGREEMENT,** made and entered into this 7th day of September 1984, by and between STAT SERVICES, P.C., a New York Professional Corporation ("Corporation"), and Daniel R. Hodge, M.D. ("Physician").

WHEREAS, the Corporation is a professional service corporation that provides medical services through duly licensed physicians; and

WHEREAS, the Corporation has entered into an agreement whereby the Corporation will provide professional services for the emergency department of the LAKE SHORE HOSPITAL presently located at Rts. 5 & 20, Irving, New York, and TRI-COUNTY MEMORIAL HOSPITAL presently located at 100 Memorial Drive, Gowanda, New York, ("Hospitals"); and

WHEREAS, the Corporation deems it to be in its interest to secure the services of Physician to provide professional services for the emergency department of the Hospitals; and

WHEREAS, Physician has indicated his willingness to execute this Agreement with respect to the provision of such services upon terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein set forth, the Corporation and Physician agree as follows:

1. AGREEMENT OF SERVICES: The Corporation hereby hires Physician to provide professional services for the emergency department of the Hospitals **according to a schedule to be established by mutual consent of the parties hereto.**

2. RIGHTS AND OBLIGATIONS. It is the intention of the parties hereto that each physician hired by the Corporation shall devote substantially equal time and effort to the provision of professional services for the emergency department of the Hospital. It is agreed that the Physician or one of the other physicians hired by the Corporation will be on call at all times, **according to a schedule to be determined by the mutual consent of the parties hereto.**

3. COMPENSATION. The Corporation agrees to pay

the Physician $ 25.00 for each hour of emergency department coverage provided by Physician pursuant to this Agreement.

4. RELATIONSHIP BETWEEN PARTIES. Physician is retained by the Corporation only for purposes and to the extent set forth in this Agreement, and his relation to the Corporation shall, during the period or periods of his services hereunder, be that of **an independent contractor.** Physician shall be free to dispose of such portion of his entire time, energy and skill as he is not obligated to devote hereunder to the Corporation in such manner as he sees fit. Physician shall not have employee status or be entitled to participate in any plans, arrangements or distributions by the Corporation pertaining to or in connection with any pension, stock, bonus, profit-sharing, or similar benefits.

5. PROFESSIONAL RESPONSIBILITY. The Corporation **shall neither have nor exercise any control or direction over the methods by which Physician performs his duties under this Agreement.** Physicians shall perform such duties substantially in accordance with **accepted medical practices;** shall be a member of the Active Medical Staff or Emergency Services Staff of the Hospital; and shall comply with the Medical Staff Bylaws, Rules and Regulations and the policies of the Hospital.

6. LIABILITY INSURANCE. Physician shall maintain a minimum of $ 300,000/$ 900,000 malpractice insurance, which insurance shall be in full force and effect during the term of this Agreement.

7. TERMINATION OF AGREEMENT. If Physician resigns or is terminated as a member of the Active Medical Staff or Emergency Services Staff of the Hospital, this Agreement shall immediately terminate. Otherwise, **either party hereto may terminate this Agreement upon two weeks' written notice to the other party.**

8. ENTIRE AGREEMENT. This instrument contains the entire agreement of the parties relating to the subject matter hereof, and the parties hereto have made no agreement or representations relating to the subject matter of this Agreement which are not set forth therein. No modification of this Agreement shall be valid unless made in writing and signed by the parties hereto.

9. WAIVER. The waiver of a breach of any term or condition of this Agreement shall not be deemed to constitute the waiver of any other breach of the same or any other term or condition.

10. GOVERNING LAW. This Agreement shall be construed in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year first above written.

STAT SERVICES, P.C.
By Lynn Feldman, D.O.

Daniel R. Hodge, M.D.
Employee